UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
TADEUS ZUBRICKI	)	Case No. 93-10874-AT
DEBRA J. ZUBRICKI	)	Chapter 7
	)	
Debtors	)	

MEMORANDUM OPINION

A hearing was held on January 3, 1996, on the debtors' motion to reopen their close to file a complaint to determine the dischargeability of a debt owed to John D. Krooth & Associates ("Krooth"). Krooth objected on the ground that the debt was clearly a post-pet obligation. The court ruled from the bench that the issue was sufficiently in doubt that it c only be resolved in the context of an adversary proceeding to determine dischargeability a granted the debtors' motion. An order was subsequently entered implementing the court' Because the issue of the dischargeability of the debt may be raised in connection with pen state court proceedings to enforce two judgments obtained by Krooth against the debtors court believes some further discussion of the issues is warranted. Accordingly, this memor opinion will supplement the court's findings of fact and conclusions of law stated orally on record at the hearing.

Findings of Fact

Tadeus and Debra J. Zubricki (collectively, "the debtors" or "the Zubrickis") filed a voluntary chapter 7 petition in this court on March 2, 1993. The case was noticed to credi

a "no asset" case, and no deadline was ever set for the filing of proofs of claim. The debto received their discharge on June 25, 1993, and their case was closed on June 29, 1993.

At the time the debtors filed their petition, Mr. Zubricki owned and operated —appar through a closely-held corporation called Zed & Co., Inc.—a restaurant in Fairfax County, Virginia, known as "Zed."[1] The business premises were occupied under a written 10-year lease either with Krooth or a predecessor in interest as landlord, that had been signed in Decem 1986. At the same time, the Zubrickis signed a $60,000 promissory note.[2] This instrument was unclear whether the Zubrickis' were the actual obligors under the lease and note, or simply guarantors, but in any event they were personally liable. Notwithstanding their personal lia on the lease and note, the Zubrickis did not list any liability to Krooth on the schedules filed their bankruptcy case.[3] They testified the reason they did not do so because they regarded the case as a "personal" bankruptcy, and since Mr. Zubricki intended to continue operating the restaurant, they did not think they had to list "business" liabilities. There is no evidence th Krooth was ever informed of or otherwise had any knowledge of the bankruptcy filing until August of this year.

Very soon after the debtors received their discharge, the rent apparently fell substan in arrears. On August 31, 1993, the Zubrickis signed an instrument entitled "Agreement" w

---

[1] The corporation filed a chapter 11 petition in this court on November 2, 1995. The cas converted to chapter 7 on December 20, 1995, after Krooth was granted relief from the autom stay.

[2] There was no evidence presented as to the purpose of the note, but the amount represented the purchase price of restaurant equipment used in connection with the business.

[3] Mr. Zubricki testified that he could not remember if the rent was fully current at the ti bankruptcy petition was filed, but that there might have been a small arrearage.

acknowledged $12,196.44 in lease arrearages. Under the agreement, this amount was ad
the note (which apparently by then had been nearly paid down) and the payments were ex
for an additional 14 months (from December 1993 to February 1995). In April 1995, appar
as part of an agreement that allowed Mr. Zubricki to remain in the premises while he atter
sell the business, the Zubrickis' signed a confessed judgment promissory note for $22,777
representing past due installments of rent. When the note was not paid, Krooth caused ju
to be confessed on the note[4] and also brought an unlawful detainer action against the Zubrickis i
state court. While the sequence of events is not totally clear from the testimony and exhib
appears that prior to the hearing on the unlawful detainer action, the debtors mailed to Kr
or about August 8, 1995, a copy of amended schedules adding Krooth as a creditor in thei
case and furnishing him with a copy of their discharge.[5] Krooth nevertheless proceeded in state
court to obtain a judgment for possession and a money judgment against the debtors on A
25, 1995, in the amount of $33,679.00 for unpaid rent. The debtors did not file a timely m
the state court to set aside the confessed judgment (or judgments), nor did they plead the
discharge as a defense to the prayer for a money judgment in the unlawful detainer action
debtors' attorney represented to the court that the reason the debtors did not raise or liti
discharge issue in the state court was because he believed that filing the amended schedu

---

[4] Mr. Zubricki's testimony was that the amount of the confessed judgment was $60,000. No cop
of any judgments were placed in evidence, and the court is left to speculate that the $60,000 may have
represented both the December 1983 note (as modified by the agreement of August 1993) and the April
1995 note.

[5] The amended schedules and certification that they had been mailed to Krooth were filed
clerk of this court on October 24, 1995. The liability to Krooth was described as being in the amount
of $17,310, described as "personal loan guarantee."

"stayed" the state court action.[6] Kroth has served the debtors with a summons to answer interrogatories, a standard procedure in Virginia for the enforcement of judgments, and th debtors in response have filed the present motion.

Conclusions of Law

This court has jurisdiction of this controversy under 28 U.S.C. § 1334 and 157(a) and general order of reference entered by the United States District Court for the Eastern Dist Virginia on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

I.

Under § 350(b) of the Bankruptcy Code, "a case may be reopened in the court in wh such case was closed to administer assets, to accord relief to the debtor or for other caus Fourth Circuit has held that the decision whether to reopen a bankruptcy case depends on circumstances of the individual case and is within the sound discretion of the bankruptcy c Hawkins v. Landmark Finance Co., 727 F.2d 324, 326 (4th Cir. 1984) (affirming denial of motion to reopen case to file a lien avoidance action with respect to a debt the debtors ha erroneously listed as unsecured).

The present motion involves the vexing and recurring problem of the unlisted credito chapter 7 bankruptcy. The issue has been previously addressed by this court in several op dealing with motions by debtors to reopen their cases to add omitted creditors. In re Shoaltes Va. Lawyers Weekly, Mar. 7, 1994 at 1, No. 91-13947-AB (Bankr.E.D.Va. Feb. 4, 1994) (Te J.); In re Walters, No. 93-10610-AB (Bankr.E.D.Va. Feb. 16, 1993) (Terrell, J.); In re Woolard,

[6] Mr. Zubricki testified that he and his wife did not appear at the trial of the unlawful detainer action because their bankruptcy counsel advised them they did not need to appear.

Va. Lawyers Weekly, June 26, 1995, No. 93-24190-B (Bankr.E.D.Va. Jun. 6, 1995) (Mitchell, J.); In re Carberry, 186 B.R. 401 (Bankr.E.D.Va. 1995) (Tice, J.). There would be little point in recapitulating the analysis in those cases, and the reader is referred to those opinions, and authorities cited therein, for a full discussion of the issue. Essentially, however, the opinion conclude that in a no-asset chapter 7 bankruptcy, a debt not listed on the debtor's schedu nevertheless discharged unless it is a debt of the kind specified in § 523(a)(2),[7] (a)(4), or (a) the Bankruptcy Code or is nondischargeable under some other provision of the Bankruptcy Conversely, if the debt is of the kind specified in § 523(a)(2), (a)(4), or (a)(6) or is otherwise nondischargeable, it is not discharged simply because the court permits amended schedul filed listing the debt. Furthermore, where the debt has not been listed in time to permit th creditor to file a timely nondischargeability complaint under § 523(c), Bankruptcy Code, an Fed.R.Bankr.P. 4007(c), a state court has concurrent jurisdiction with this court to determi whether the debt has been discharged. As succinctly explained by Judge Tice in Walters, supra, debtor who has failed to list a creditor in a no-asset case has several avenues of relief if pu on account of the unscheduled debt:

> The debtor is entitled to assert his discharge as a defense to any collection action by the creditor, assuming the debt is not of a nondischargeable character ... as [of a] kind specified in 11 U.S.C. § 523(a)(2), (4) or (6) or under some other § 523(a) exception to discharge. Unless the creditor is suing on the basis that the claim is nondischargeable under some provision of 11 U.S.C. § 523(a), the suit against the debtor violates the discharge injunction. If the creditor continues to pursue the action, despite the debt's dischargeable character, the debtor may file a motion to reopen the

[7] Such debts include those arising from false pretenses, a false representation, actual fraud written financial statement, fraud or defalcation while acting in a fiduciary capacity, embezzleme larceny, or willful and malicious injury.

> case to prosecute a motion to hold the creditor in contempt of the discharge injunction. The debtor might also seek to reopen the case to file a complaint to determine whether the debt is nondischargeable, e.g., under 11 U.S.C. § 523(a)(3)(B) as of a kind specified in § 523(a)(2), (4) or (6).

Slip op. at 2.

In the present case, the debtors are seeking to pursue one of the avenues suggeste Judge Teel—that is, the reopening of their case to file a complaint to determine whether th to Krooth is nondischargeable. Krooth does not dispute the general proposition that the d not made nondischargeable solely by virtue of not having been listed on the debtors' sche asserts that reopening the case is unwarranted because the debt is clearly a[8] post-petition That argument, of course, essentially puts the cart before the horse. Under Fed.R.Bankr.P a determination whether a particular debt has been discharged requires an adversary proc which is precisely what the debtors are seeking leave to file. On the other hand, there will be cases where it is clear from the undisputed facts that a particular debt is nondischargea where reopening the case for the purpose of litigating dischargeability would be a waste of resources and an unwarranted burden to the defendant creditor. See, e.g., Thompson v. Commonwealth of Va. (In re Thompson), 16 F.3d 576 (4th Cir. 1994) (affirming bankruptcy court denial of chapter 7 debtor's motion to reopen case to add unpaid court costs from state c criminal conviction, since debt was nondischargeable as a matter of law).

---

[8] "[A] discharge under ... this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter ... whether or not a proof of claim based on any such debt or liability is filed ..., and whether or not a claim based on any such debt or liability is allowed 727(b), Bankruptcy Code (emphasis added).

Here, however, the court cannot say with confidence that the issue of dischargeabili not fairly debatable and may not require a close inquiry into the surrounding facts. Certain is some force to Krooth's argument that the post-petition promissory note and post-petitio installments constitute post-petition liabilities where the debtors remained in possession of enjoyed the benefit of the premises for more than two years after their bankruptcy filing. same time, the lease itself was signed, and the debtors' liability for the rent due for the en of the lease became fixed, pre-petition. With respect to the promissory note, the somewh sketchy evidentiary record suggests that the debtors may have received independent cons in the form of the landlord's forbearance of its right to evict the debtors for nonpayment o This is an issue best resolved, however, in the context of an adversary proceeding to dete the dischargeability of the confessed judgment (or judgments) on the promissory note (or and the money judgment entered in the unlawful detainer action.

While the court is concerned over the debtors' failure to list what they considered "business" rather than "personal" debts,[9] and to inform the landlord of the filing, there is no suggestion that the failure to list their liabilities to Krooth was motivated by any desire or p

---

[9] Debtors' counsel is obviously not free from fault with respect to the failure to list the de personal liability on the lease and promissory note. While it is easy to understand h unsophisticated debtors might misunderstand the necessity to list "business" debts (particula payments were current and the liability was contingent, which may not have been the situation in the Zubrickis' case) when filing a "personal" bankruptcy, certainly debtor's counsel woul understood that all liabilities had to be listed. The debtors' schedules disclosed their interest & Co., Inc., and it is difficult to understand how the personal liability on the business's debts would not have surfaced if counsel had done an adequate job of interviewing his clients. Put another way, it is not sufficient for counsel to give clients desiring to file bankruptcy a worksheet and them to list "all" their debts; given the large number of potential liabilities that consumer debtors may not even realize they have, a debtor's attorney has a duty to explore the existence of such liabilities with his client to ensure that the schedules are accurate and complete.

hinder, delay, or deceive Krooth, nor does it appear that the debtors deliberately gained a advantage or otherwise acted in bad faith.[10] The court also has some concern over the debtors' failure to plead their discharge in connection with the confessed judgment on the note or t unlawful detainer action. As noted above, state courts have concurrent jurisdiction with th to decide whether or not the debts in question were included within the scope of the debt discharge. The state court, had the issue been brought to its attention, might well have d in the debtors' favor with less delay and expense to the creditor than will occur as a result bringing the matter back to this court. Alternatively, the debtors could have requested th court to stay its proceedings while the debtors returned to this court to obtain a ruling on issue. That motion, if granted, might also have saved Krooth some time and expense in th court. On the other hand, it appears that Krooth had actual knowledge prior to the trial o unlawful detainer action that the debtors considered their liability under the lease to have discharged. By choosing to go forward, Krooth ran the risk that the debtors might avail themselves of the very remedy they now seek. In any event, the discharge granted to the in a chapter 7 case is such a central component of the fresh start that Congress intended on honest debtors[11] that bankruptcy courts should be vigilant to ensure its enforcement.

---

[10] Of course, since the landlord was not given notice of the bankruptcy filing, the landlord had no opportunity to negotiate a timely reaffirmation agreement with the debtors. See § 524(c) Bankruptcy Code (agreement between debtor and creditor "to consider a debt that is discharged in whole or in part, is based on a debt that is dischargeable," is enforceable only if certain specified condition are met, one of which is that "such agreement was made before the granting of the discha

[11] See Local Loan Co. v. Hunt, 292 U.S. 234, 244-245, 54 S.Ct. 695, 78 L.Ed. 1230 (1934):

> One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit
>
> (continued...)

Accordingly, having considered all the equities, the court concludes that the case should b reopened to permit the issue of dischargeability to be litigated in this court.[12]

---

[11](...continued)

> him to start afresh free from the obligations and responsibilitie consequent upon business misfortunes.' This purpose of the has been again and again emphasized by the courts as being of as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement o pre-existing debt.

(internal citations omitted).

[12] Nothing in this opinion should be construed as expressing a view on the ultimate issu dischargeability.

II.

One additional matter merits discussion. As noted above, the debtors' attorney represented that pleadings were not filed in the state court asserting the debtors' discharg because the debtors had given Krooth notice of the intent to add him as a creditor under a procedure recently adopted by this court and believed that such notice and subsequent fil "stayed" the proceedings in the state court. The procedure referred to was adopted subs Judge Teel's decisions in Shinwalter and Walters, supra, holding that reopening a closed no-asset chapter 7 case for the purpose of filing amended schedules was a futile act, because the o debt either had been discharged or was nondischargeable, and adding it to the schedules not change its status. In response to those and similar decisions, this court adopted an administrative procedure permitting the filing of amended schedules in closed no-asset cas without a formal motion to reopen, if the amended schedules were accompanied by a cert (1) that the creditor to be added was given 30 days notice of the intended amendment an file an objection to the amendment; (2) that the debtor did not intentionally omit the credi the original schedules; and (3) that the debtor did not intend to hinder, delay or defraud th creditor. If no objection were filed within the 30-day period, the clerk was authorized to fil amended schedules in the closed case. As explained in Woodland, supra, however, this procedure was not adopted with the view that filing amended schedules had any legal effect on the dischargeability of the newly-added debts, but as a pragmatic response to the concern of r debtor's attorneys that most creditors, and a significant number of state court judges, ass (incorrectly) that a debt not listed on a debtor's schedules was per se excepted from the debtor

discharge, and that the best evidence the debt was discharged was a copy of the discharg

and the debtor's schedules listing the debt.

Presumably, in those instances where a creditor is given notice of the intended amen

and does not file an objection, the creditor accepts the debtor's characterization of the de

having been discharged, and the matter is laid to rest. Nevertheless, as discussed in Walters,

Woolard, and Carberry, supra, simply amending the schedules in a no-asset case to add a

previously-omitted creditor does not affect the dischargeability of the debt. At best, it pla

affected creditor on notice that the debtor considers the debt to have been discharged, so

the creditor, disagreeing with the debtor's characterization, proceeds with enforcement ac

does so at its peril. A cautious creditor, of course, may itself seek to reopen the debtor's c

obtain a declaratory judgment from the bankruptcy court. Alternatively, and less cautious

may proceed in a nonbankruptcy forum if it believes in good faith that the debt is

nondischargeable. If it does so, however, it runs the risk that the debtor may bring a moti

bankruptcy court to hold the creditor in contempt for violation of the discharge injunction.

In any event, it should be clear that filing amended schedules adding an omitted cre

a closed case does not by itself "stay" proceedings to enforce the debt in another forum.[13] Under

§ 362(a), Bankruptcy Code, the filing of a bankruptcy petition creates an automatic stay of

actions against the debtor to enforce a pre-petition liability. The stay is not permanent, ho

and terminates when the debtor receives a discharge. § 362(c)(2)(C), Bankruptcy Code. It

---

[13] Of course, a debtor filing a complaint in this court to determine the dischargeability of a debt could also seek a preliminary injunction to prevent the creditor from proceeding in a forum. Whether such an injunction would be granted in a particular case would require consideration of the balancing-of-hardships test enunciated in Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977).

replaced, with respect to dischargeable debts, by the discharge injunction of § 524 of the Bankruptcy Code:

> (a) A discharge in a case under this title—
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 ..., whether or not discharge of such debt is waived.
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

Of course, a creditor whose claim has been discharged is in effect permanently stayed and held in contempt for actions that violate the discharge injunction. But a creditor is not pro from enforcing a nondischargeable debt—or as Krooth asserts here, a post-petition debt—s because the debt has been added to the schedules in the debtor's closed case. Put anoth adding a creditor after the debtor has received his or her discharge does not revive the § 3 automatic stay and does not automatically suspend proceedings in another forum. Wheth proceedings in another forum are enjoined is solely a function of whether the debt has bee discharged.

Conclusion

For the reasons stated in this opinion, the court concludes that proper cause exists t reopen the debtors' case in order to file a complaint to determine the dischargeability of th owed to Krooth. As set forth in the order separately entered by this court, the complaint m filed within 30 days of the hearing (i.e., not later than February 2, 1996). Since the case is reopened for a matter relating to the debtors' discharge, the filing fee will be waived. Noth

this opinion is intended as expressing a view as to whether the debtors' liability on the deb

question constitute pre-petition or post-petition liabilities; that issue will have to be determ

within the context of the adversary proceeding.

Date: January 10, 1996

_____ Stephen S. Mitchell _____
Stephen S. Mitchell
Alexandria, Virginia
United States Bankruptcy Judge

Copy to:

John Rosenberg, Esquire
510 North Washington Street
Alexandria, VA 22314
Counsel for the Debtors

Donald King, Esquire
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 100
Fairfax, VA 22031
Counsel for John D. Krooth & Associates